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No. 92-536

In The

Supreme Court of the United States

OCTOBER TERM, 1992

HARVEY DURHAM,

Petitioner,

v.

DR. ALVIS L. CORUM,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of North Carolina

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

ARE THERE ADEQUATE AND INDEPENDENT STATE GROUNDS TO SUPPORT THE JUDGMENT OF THE NORTH CAROLINA SUPREME COURT?

DID THE SUPREME COURT OF NORTH CAROLINA CORRECTLY APPLY THE DOCTRINE OF QUALIFIED IMMUNITY TO A CASE WHERE THE STATE OF MIND OF THE DEFENDANT IS AN ESSENTIAL ELEMENT OF THE CONSTITUTIONAL RIGHT ALLEGEDLY VIOLATED?

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RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF JURISDICTION

The Respondent contends that this Court does not have jurisdiction over this matter. In addition to rejecting the petitioner's defense of qualified immunity, the Supreme Court of North Carolina determined that the respondent had an independent cause of action under the North Carolina Constitution for violation of his free expression rights. Thus, there was an independent and adequate state ground to support the judgment below so that this Court's review could amount to nothing more than an advisory opinion.

STATEMENT OF THE CASE

In June of 1984, Dr. Alvis Corum was completing his fourteenth year as the Dean of Learning Resources of Appalachian State University. As dean, Dr. Corum supervised the University's academic support units including the library, audio-visual services, and the Appalachian Collection, a diversified collection of books, research reports, music scores and over three hundred artifacts representing the mountain culture of the southern Appalachian region. Some of the artifacts were owned by the University; the remainder were on loan from private citizens. Because some of the privately owned artifacts had previously sustained damage for which the University had compensated the owners, University officials were aware of the need to take precautions in safeguarding the collection.

During the 1983-84 academic year the possibility of relocating the Appalachian Collection from one of the library buildings on campus was first discussed. Harvey Durham, as Vice Chancellor for Academic Affairs, was responsible for the decisions regarding the location of the collection. During the academic year the possible move of the collection was the subject of faculty debate and received attention in the campus newspaper. During the discussion primary concerns raised by Dr. Corum and others were the need to maintain the integrity of the collection and the need to ensure its security. By June of 1984, Dr. Durham had decided that the artifacts were going to be split from the rest of the collection. However, Dr. Durham deliberately misrepresented this fact to Dr. Corum during a meeting on June 21, 1984. In this meeting, and by memo, Dr. Durham misadvised Dr. Corum

that the entire collection was to be moved immediately to University Hall, a facility some distance from the main Appalachian State University Campus. Dr. Durham also told Dr. Corum that the organizational responsibility for the collection would be transferred to another department.

While Dr. Corum expressed concern over these transfers, he accepted the decision regarding the collection as one which was workable because it maintained the integrity and security of the collection and the meeting between Dr. Durham and Dr. Corum was cordial and businesslike. Subsequent to his meeting with Dr. Durham, Dr. Corum met with library staff members to advise them of the decision and prepare for the move, which was to be coordinated by Associate Dean Parker.

On June 24, 1984, Dr. Parker met with Plaintiff Corum, Librarian Richard Barker, and staff member Judy Ball to discuss the move. In this meeting, Dr. Parker unexpectedly announced that the collection was to be dismembered with the artifacts of the collection being moved to a storage area in the Belk Library basement.

The Plaintiff, Librarian Barker and Miss Ball saw this change as a dramatic shift from the directions previously given to Dr. Corum by Dr. Durham. Dr. Corum specifically told Dean Parker that this new plan regarding the artifacts was inconsistent with his understanding of Dr. Durham's instructions that the collection would remain intact at University Hall. Dean Parker invited Dr. Corum and his staff to propose alternative solutions to the problems they perceived, but gave no explanation for his drastic departure from Dr. Durham's earlier instructions.

Dr. Corum, Librarian Barker and Miss Ball recognized that the apparently new plan to split the collection and store the artifacts in a basement would jeopardize the collection's integrity and security. After the meeting with Dr. Parker the three library professionals put together an alternative proposal. Since Dr. Durham had chosen to be absent from the campus during the move, Dr. Corum had no opportunity to question the inconsistency between Durham's communications with him and Parker's plans or to tell Durham of the library staff's concerns over the collection's destruction.

At a second meeting with Dean Parker on June 26, 1984, Dr. Corum again stated his concerns over the breakup of the collection and put forward his alternative proposal. Dean Parker responded that he did not have the authority to entertain such a proposal; however, he volunteered to immediately relay Dr. Corum's concern and proposal to Dr. Durham by phone.

At no time did Dr. Corum refuse to go through with the move. In fact, Dr. Corum encouraged the staff to proceed with the move and physically helped in the packing and subsequent move of the collection. After the second meeting, Dr. Parker called Dr. Durham and told Dr. Durham that Dr. Corum had presented an alternative proposal to dismembering the collection, and that Dr. Corum wished to discuss this alternative with Dr. Durham. Dr. Durham immediately returned to Appalachian State University, and without talking to Dr. Corum or giving him any chance to explain his proposal, removed Dr. Corum as Dean of Learning Resources.

At the time of the meetings with Dean Parker, Dr. Corum was unaware that Dr. Durham had intentionally misrepresented to him that the collection was to be moved as a unit. Subsequently it was revealed that, at the time of Dr. Durham's June 21, 1984, meeting with Dr. Corum, another meeting, chaired by Dean Parker, was being held to discuss the actual breakup of the collection. The purpose of this ruse was to deny the academic community time to react to the decision to dismantle the collection. By concealing these plans until the last minute, the collection could be dismembered before the academic community could react. Thus, Dr. Corum's efforts to submit a proposal which would protect the collection met with the swift and chilling decision to remove him as dean. This removal had a single purpose: to signal to lower ranking staff persons within the Learning Resources department that the move was to proceed immediately and without any further questions regarding the destruction of the collection.

Following an unsuccessful internal grievance proceeding, Dr. Corum brought this action. The statement of the legal proceedings set out in the petition reflects the course of the litigation. In addition to ruling on the qualified immunity defense raised by Dr. Durham, the Supreme Court of North Carolina also determined that Dr. Corum's § 1983 claim for prospective equitable relief could proceed against the university officials named in their official capacities and that Dr. Corum had a direct cause of action against Dr. Durham under the state constitution. (Pet. 31A).

REASONS WHY THE PETITION SHOULD BE DENIED

1. The decision below is supported by independent and adequate state grounds so that review by the Court would constitute an advisory opinion.

The only issue raised by the petition is whether the North Carolina Supreme Court erred in denying Dr. Durham's qualified immunity defense to Dr. Corum's § 1983 claim for damages. Since the court below determined that Dr. Corum also has a direct cause of action against Dr. Durham under the free expression provisions of the North Carolina Constitution, Dr. Corum may obtain full relief under the judgment of the court below no matter how the federal question raised in the petition is resolved.[1]

As has oft been noted by this Court, the Court's "power is to correct wrong judgments, not to revise opinions. [The Court] is not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion." *Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945). In this matter the state supreme court recognized that the state constitution protects the same free expression rights that are safeguarded by the First Amendment; however, the state court did not adopt the qualified

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[1] Counsel for Dr. Durham has acknowledged before the court below that under the provisions of N.C.G.S. § 143-300.2 – 300.6 the state would be responsible for § 1983 damages liability assessed against Dr. Durham up to $100,000. Dr. Corum has agreed and stipulated that he will neither seek nor accept damages in excess of $100,000 from Dr. Durham.

immunity defense that this court has fashioned to protect state officials from claims under § 1983. Rather, it noted that Dr. Durham retained all defenses available under state law. (Pet. 27A). The state court is under no federal obligation to afford state officials a particular type of immunity for violation of state constitutional rights, and the decision by the state court is in no way evasive of, or discriminatory against, federal rights. Thus, this case fits squarely within the rule that where there is an independent and adequate state ground to support the judgment of a state court this court will decline jurisdiction since its review "could not affect the judgment and would therefore be advisory". *Coleman v. Thompson*, ___ U.S. ___, 111 S.Ct. 2546, 2554 (1991).

2. The court below fully considered and correctly decided the qualified immunity issue.

Writing for the North Carolina Supreme Court, Justice Martin understood the directions of this Court in the *Harlow* and *Anderson* decisions. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982); *Anderson v. Creighton*, 483 U.S. 635 (1987). He also recognized, as have a number of the federal circuits, that "*Harlow*'s purely objective test cannot in the end avoid the necessity to inquire into official motive or intent or purpose when such states of mind are essential elements of the constitutional right allegedly violated." (Pet. 10A) quoting, *Collinson v. Gott*, 895 F.2d 994, 1001-02 (4th Cir. 1990) (Phillips, J., concurring) (citations omitted). Accord, e.g. *Stewart v. Baldwin County Bd. of Election*, 908 F.2d 1499 (11th Cir. 1990); *Morris v. Clifford*, 903 F.2d 574 (8th Cir. 1990); *Pueblo Neighborhood Health Ctrs., Inc. v.*

Lasavio, 847 F.2d 642 (10th Cir. 1988); *Gutierrez v. Municipal Court*, 838 F.2d 1031, 1050 n. 25 (9th Cir. 1988); *Martin v. D.C. Metropolitan Police Dept.*, 812 F.2d 1425, 1432 (D.C. Cir.) holding vacated, 817 F.2d 144 (D.C. Cir.), holding reinstated sub nom. *Bartlett ex rel. Neuman v. Bowen*, 824 F.2d 1240 (D.C. Cir. 1987).

Justice Martin applied the *Harlow-Anderson* test by first determining if a reasonable official in Dr. Durham's position could have believed that his actions were lawful in light of clearly established law at the time, and in light of the information possessed by Dr. Durham at the time he demoted Dr. Corum. (Pet.12A). To make this determination the court reviewed the federal law at the time of the demotion and determined that the law "clearly protected" a university employee from retaliation based on his statements regarding a matter of public concern. *Pickering v. Board of Education*, 391 U.S. 563 (1968); *Connick v. Meyers*, 461 U.S. 138 (1983). Justice Martin then dealt with the heart of the matter. Dr. Corum alleged that his demotion was based upon his statements while Dr. Durham insisted that Corum's statements were not the bases for his action: "if the motive was to suppress speech, one result is reached, while if the motive was to punish insubordination, another conclusion results." (Pet. 15A). The court then recognized that in a case such as this, where state of mind is an essential element of the right allegedly violated, there is a risk that the impediment to summary resolution which *Harlow* and *Anderson* "deliberately sought to remove could be reimposed." (Pet. 16A). In order to minimize this risk the court below adopted the same test used by at least four of the federal circuits:

> [W]here the defendant's subjective intent is an element of the plaintiff's claim and the defendant has moved for summary judgment based on a showing of the objective reasonableness of his actions, the plaintiff may avoid summary judgment only by pointing to specific evidence that the official's actions were improperly motivated.

(Pet. 17A), quoting *Pueblo*, 847 F.2d at 649; see also *Collinson*, 895 F.2d at 1001-02; *Martin*, 812 F.2d at 1434. Accord, e.g., *Stewart*, 908 F.2d 1499.

The court recognized that "[t]his approach appropriately retains the *Harlow* 'objective look' test with respect to the law applicable at the time of the alleged violation, but it also permits a plaintiff who has some proof of the alleged violation to attempt to convince the finder of fact that his allegations are correct." Any approach which foreclosed "this opportunity would effectively prevent every plaintiff from recovering on a claim which has an element requiring a determination of subjective intent." (Pet. 17A).

Justice Martin then reviewed Dr. Corum's evidence and found that the move of the Appalachian Collection had been the subject of public debate on the college campus and that Dr. Corum was a strong proponent of keeping the Collection together if it was moved. Further, not only had Dr. Durham failed to advise Dr. Corum that the Collection was to be split when he informed him of the move, but also Dr. Durham had advised Dr. Corum by memorandum that "the Appalachian Collection will be physically housed in University Hall," specifically leading Dr. Corum to believe that the entire Collection would

be housed together. As Justice Martin then notes: "In fact, Durham had already decided to split the Collection, the artifacts to be stored in the basement of another building. Thus, the 21 June memo becomes the 'smoking gun,' revealing the effort to deceive Dr. Corum until it was too late for public protests." (Pet. 19A-20A).

Having found that Dr. Corum had succeeded in pointing to specific evidence that Dr. Durham's actions were improperly motivated, the court below correctly ruled that the trial judge had properly denied Dr. Durham's motion for summary judgment based upon the defense of qualified immunity. (Pet. 20A). In so doing the court correctly applied the federal law as it relates to the defense of qualified immunity in a case where the state of mind of the defendant is an essential element of the constitutional right allegedly violated.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted this the 26th day of October 1992.

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